

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DONNA HUBBARD,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF NORTHERN COLORADO,

Respondent.

This matter was heard on December 5, 2001, and on February 19 and 20, 2002, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Jill M. M. Gallet, Assistant Attorney General. Complainant appeared in-person and was represented by Nora V. Kelly, Attorney at Law.

MATTER APPEALED

Complainant appeals the August 31, 2001 disciplinary termination of her employment. For the reasons set forth below, the disciplinary action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Donna Hubbard, commenced employment with the University of Northern Colorado (UNC), respondent, in the fall of 1995 as an Administrative Assistant II. She worked in the Center for International Education (CIE).
2. The CIE consists of more than 250 foreign students. Complainant managed the office. Her duties included filling out immigration forms, budget items, and supervising graduate assistants. She was the main contact for the students, who referred to her as “Mother Hubbard” for her helpfulness.
3. Over a period of six years, complainant served under four different directors and two or three interim directors.
4. Immigration law is complex and frequently changes. When expertise in international law was not available in the office, complainant would contact outside sources for the necessary information. The sources included the international student offices at the University of Colorado, Colorado State University, Metropolitan State College of Denver, and the Immigration & Naturalization Service office in Denver.
5. As CIE Director from July 1, 2000 through April 2001, Dr. Bernard La Berge was complainant’s immediate supervisor. La Berge found her to be a thoughtful, careful, and knowledgeable employee who was

involved in the community and related well with the international students. She was never late for work and did not miss work.

6. La Berge rated complainant overall Fully Competent for the evaluation period April 1, 2000 through March 2001. While believing that she was ideally suited for her position and an above-average employee, La Berge rated her Needs Improvement in the areas of administrative procedures and job knowledge, his primary purpose being to promote training for her, especially in immigration law. Complainant agreed with the evaluation.
7. Will Crites, who worked at the CIE first as a graduate assistant and then as Interim Study Abroad Advisor between the fall of 1998 and the summer of 2001, describes complainant as hardworking and committed to her job. According to Crites, complainant always found a way to get things done in an over-worked office.
8. La Berge was placed on administrative leave on April 1, 2001, and his one-year contract was not renewed. Crites was not made the permanent Study Abroad Advisor, and his job ended on July 1, 2001.
9. As Associate Vice President for International Education, Dr. Allen Huang oversees the Center for International Education. After La Berge left, Huang appointed an interim director and began a national search for a permanent director of the CIE.
10. During this period, complainant was asked to process a visa for a teacher in Spain to come to the United States. Complainant had only processed this type of visa under the direction of the director, and she so informed Huang. Huang gave her the immigration forms, which he had gotten off the Internet, and complainant filled them out. They

turned out to be the wrong forms and had to be done over. Complainant was blamed for causing a delay in the teacher's arrival at UNC.

11. Mark Dorr was hired to be the new CIE Director. With an effective date of June 1, 2001, Dorr started in late May in order to acclimate himself to his new position. On May 25, 2001, Huang and Dorr met with complainant to discuss office operations. Following the meeting, Huang wrote a memo to complainant in which he thanked her for her endurance during the past eight weeks of personnel transition and outlined the four major areas of her responsibilities. Complainant agrees that these areas represent what she had been doing and fall within her job description. The memo did not so much as hint that anyone was dissatisfied with her job performance.
12. Dr. Marlene Strathe, Provost and Vice President for Academic Affairs, was Huang's direct supervisor. Huang expressed to her that he was not satisfied with complainant's job performance. Strathe read and approved Huang's May 25 memo to complainant. She directed Mark Dorr to be aware of any performance issues regarding complainant. Dorr thereafter kept a log of events and incidents that he considered negative toward complainant.
13. At the 2001 awards ceremony for international students, held in April, complainant was surprised to receive the International Person of the Year Award from the students.
14. In the spring of 2001, Huang wrote a separate note to complainant commending her job performance over the past year and thanking her for her contributions. She thought the note was supportive and took it as a compliment.

15. In addition to Dorr being new, Evelyn Pierro became the English as a Second Language Coordinator on June 1, 2001. Holly Hansen started in July as Study Abroad Coordinator, replacing Crites.
16. Pierro and Hansen both complained to Dorr about complainant's job performance, accusing her of such misdeeds as not being helpful enough, not timely filing documents, and not relaying telephone messages in a timely enough fashion. Pierro's main concern was that complainant's actions or inactions might have a negative impact on student enrollment, and if enrollment was not at a sufficient level, then her position would not be funded for the subsequent year. Dorr advised Pierro to keep a log of complainant's mistakes.
17. The summer of 2001 was hectic around the CIE office. In addition to the change of personnel, a group of Japanese students was coming for an extended stay on campus in July and various preparations had to be done.
18. On August 3, 2001, complainant was injured when her chair rolled away from her and she fell to the floor, injuring her back and wrist. She was off work for a few days and, around mid-August, was placed on half-days by her physician.
19. When complainant returned to work on August 20, after being gone for several days, she found a letter from Mark Dorr on her desk and, upon reading it, was shocked. The letter, which was read and approved by Strathe, indicated that complainant could not keep up with the workload and did not want to work on the budget, and suggested that she transfer to another position on campus. Until that time, she had no idea that there was a problem with her job performance. She had

never refused to work on the budget, though she had once nonchalantly expressed a preference for dealing with immigration issues. Her budgetary duties had always included running off monthly reports and preparing budget books. She had not intended to look for work elsewhere and did not want to, except for the fact that Dorr apparently did not want her to remain with the CIE. She put her name on the transfer list.

20. On August 27, 2001, Provost and Vice President Strathe sent a letter to Judy Zewe, Director of Human Resources and the appointing authority, requesting “an immediate disciplinary termination” of complainant for poor job performance. Zewe acted immediately on the Provost’s request by scheduling a predisciplinary meeting with complainant for the next day.
21. On that day, August 27, complainant made an appointment to speak with Dorr and Huang, but she was subsequently told by Dorr that they could not meet with her.
22. Late in the day on August 27, complainant received a telephone call at home from the human resources office setting up an R-6-10 meeting for August 28. After her half day ended on the 28th, she went to Zewe’s office to see if the predisciplinary meeting could be postponed until after she had a chance to meet with Dorr and Huang about her staying at the CIE. Zewe responded in the negative and stated that if complainant did not attend she would make her decision on the basis of Strathe’s letter.
23. At the R-6-10 meeting, complainant mostly listened. She was shaken by the accusations. Zewe gave her the option of resigning in lieu of termination.

24. On August 29, the day following the R-6-10 meeting, complainant received a certified letter dated August 28 terminating her employment effective August 31. Zewe referred to complainant's insubordination by refusing to perform budget functions and her errors in processing immigration documents accurately and in a timely manner.
25. Complainant was not insubordinate and did not refuse to perform her budgetary functions, though Dorr testified to this perception. Dorr's perception was also that complainant was not interested in training, even though she had attended three training sessions during May and June 2001 on finance, travel, and purchasing, respectively.
26. Complainant believed that she was being helpful for the new staff members. She did basically the same things she was doing before.
27. At the R-6-10 meeting, Zewe read Strathe's letter aloud. The letter referenced an incident in which a "hold" was not removed from a visa and a student consequently had to "return home." This incident had taken place in mid-summer, when the student came to the CIE office and said he wanted to enroll. He did not have any information with him, and a hold had been placed in his file. His return was to Fort Morgan, Colorado, where he worked, not his homeland (Uganda). He went back to the CIE office in a few days and was enrolled at that time. Dorr had advised Strathe in writing, via his log, that this student had to return to Africa and it was complainant's fault.
28. One of the criticisms of complainant's job performance was that a stack of unorganized papers was found on her desk. These papers consisted of responses from students who had decided not to attend UNC.

29. Pursuant to the concept that nobody is perfect, complainant does not deny that she made mistakes or that she was not always able to get things done as promptly as she would have liked.
30. During summer 2001, there was a period when complainant did not arrive at the office until twenty or thirty minutes past 8:00 because she was backlogging forms to reimburse students, a matter that dated back to when La Berge was director. She did not explain this to Dorr because "it was before his time," but she told him she would be out. She was also on a committee that met once per month until 8:30 or 9:00. She did not know that she was being looked upon as chronically late for work. She admits that it was a mistake to not specifically notify Dorr of her whereabouts, even though he was not accessible much of the time.
31. Complainant received no prior corrective actions or disciplinary actions during her six years at UNC.
32. Zewe, the human resources manager, testified at hearing that a corrective action may be given verbally, which is contrary to Rule R-6-8.
33. Since her dismissal, complainant Hubbard has not found regular employment, but she has spent time helping her brother with the family business and, from that, has received some income.

DISCUSSION

I.

Rule R-6-8, pertaining to corrective actions, provides in pertinent part:

Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure. It shall be a written statement that includes the areas for improvement, the actions to take, a reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and, a statement advising the employee of the right to grieve and the right to attach a written explanation.

Rule R-6-2, mandating progressive discipline, provides in full:

A certified employee except employees in the Senior Executive Service shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

This case presents an example of why corrective actions are necessary before dismissing an employee for poor job performance in the state classified personnel system. The purpose of a corrective action is to give the employee clear and specific notice in writing of the areas of her job performance that are deficient and need improvement. The employee is entitled to a period of time in which to improve her performance before disciplinary steps are taken. She must be advised of potential consequences and may provide a written response to the corrective action and may also file a grievance. The agency is required to

provide appropriate notice to the employee of these rights under the state personnel system.

In the instant case, none of the required elements of a corrective action is present. Complainant had reason to believe that her job performance was satisfactory for six years, and she did so believe. She was truly caught off guard to hear that her performance was so deficient as to warrant termination. By then, it was too late for her to attempt to explain or to make the necessary improvements.

It is inferred from the evidence that the Provost's August 27 "request" to immediately terminate complainant's employment was taken by the human resources manager and appointing authority to be a directive. Disciplinary action was taken the next day. To fail to implement progressive discipline under the circumstances of this case is inexcusable and contravenes the letter and spirit of the personnel rules.

II.

Respondent contends that unsatisfactory job performance over a period of time can become "so flagrant or serious" as to justify immediate discipline, in this case, termination. Yet, if that were accepted, then there would be no reason for the progressive discipline requirement, the purpose being to provide an employee with notice and the opportunity to make improvements before incidents pile up to the extent that overall performance becomes "so flagrant or serious." There is no credible evidence in this record to substantiate a claim that complainant's job performance was so flagrant or serious such that immediate discipline was proper, especially the economic death penalty. The evidence suggests that she became everyone's scapegoat for imperfection and the criticisms of her were slanted and blown out of proportion.

In addition to the procedural violation, respondent did not satisfy its burden to prove by preponderant evidence that there was just cause for the termination of complainant's employment. See *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

III.

Respondent's procedural violation constitutes agency behavior that is arbitrary, capricious or contrary to rule or law and cannot be sustained. Respondent's disciplinary action was taken in bad faith and was groundless.

An agency's failure to follow procedural rules constitutes bad faith and justifies an award of attorney fees and costs. See *Mayberry v. University of Colorado Health Sciences Center*, 737 P. 2d 427 (Colo. App. 1987). When the agency has no grounds for the particular disciplinary action taken, an award of attorney fees is mandated. *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), *cert. denied*. See *Hartley v. Department of Corrections*, 937 P.2d 913 (Colo. App. 1997). "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose...was instituted frivolously, *in bad faith*, maliciously or as a means of harassment *or was otherwise groundless*,... the department, agency, board, or commission taking such personnel action *shall* be liable for any attorney fees and other costs incurred by the employee...." Section 24 50-125.5, C.R.S. (emphasis supplied).

CONCLUSIONS OF LAW

1. Respondent's action in terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

2. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's disciplinary action is rescinded. Complainant shall be reinstated to her former position with full back pay and service benefits, less an offset for any income complainant would not have earned but for the termination. Respondent shall pay to complainant the amount of her attorney fees and costs reasonably incurred in pursuing her appeal.

DATED this ____ day
of March, 2002, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of March, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
Attorney at Law
1776 Lincoln Street, Suite 1014
Denver, CO 80203

And by courier pick-up to:

Jill M. M. Gallet
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
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